

Richmond Public Interest Law Review

Volume 22 | Issue 2

Article 4

4-23-2019

2018 SYMPOSIUM LECTURE: #METOO AND PROCEDURAL JUSTICE

Lesley Wexler

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Recommended Citation

Lesley Wexler, *2018 SYMPOSIUM LECTURE: #METOO AND PROCEDURAL JUSTICE*, 22 RICH. PUB. INT. L. REV. 181 (2019).
Available at: <https://scholarship.richmond.edu/pilr/vol22/iss2/4>

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2018 SYMPOSIUM LECTURE: #METOO AND PROCEDURAL JUSTICE

*Lesley Wexler**

*Professor, University of Illinois College of Law. Professor Wexler is also the co-author of the related paper: Lesley Wexler, Jennifer K. Robbennolt & Colleen Murphy, *#MeToo, Time's Up, and Theories of Justice*, 2019 U. ILL. L. REV. 45 (2019).

LECTURE

Thank you so much, Riley Henry, for all of the help in putting this symposium, and to the University of Richmond Law School, and to the *Public Interest Law Review* for putting on this very timely panel. I am a lawyer, but I've been a professor for almost as long as I've been a lawyer, so I tend to think of law questions sometimes as non-law questions and, to me, #MeToo is a perfect example of something that is both a law and a non-law question. My talk today is about #MeToo and procedural due process and what I call colloquial due process.

To lawyers, due process is a question of constitutional law. It's a question framed within the constraints of government action, what interests are at stake for a person facing state deprivation, and specific bodies of law governing actions as diverse as criminal proceedings and administrative hearings. But as we're entering the first anniversary of #MeToo, the question of due process is becoming increasingly detached from its formal legal setting and often applied unreflexively - and to my mind inappropriately - to non-legal settings. Take for example, this tweet from President Trump in response to a White House aide who resigned - he was not fired - he resigned, in the wake of a corroborated domestic abuse allegation: "People's lives are being shattered and destroyed by a mere allegation. Some are true and some are false. Some are old and some are new. There is no recovery for someone falsely accused - life and career gone. Is there no such thing any longer as Due Process?" Given my concerns about this non-legal or colloquial invocation of due process, I want to use my talk to provide lawyers, citizens, and commenters the tools to intervene in the #MeToo conversation and help craft and reinforce more appropriate fairness norms in non-legal settings.

In the next few minutes, I'll do the following. One: I'll try to explain the difference between formal due process and what I call colloquial due process. Sometimes people who are speaking about due process are simply confused. They think that a legal rule applies in a non-legal setting when it does not. And sometimes, they're not confused. They have a normative preference. They think the legal rule should apply in a non-legal setting. And I want to disentangle that. Second, I'll also try to provide some contemporary examples of colloquial due process that demonstrate either a mismatch - so the demand for process simply doesn't match the interest at stake or the setting - or a demand for protection for accused perpetrators that simply isn't afforded to #MeToo victims under similar conditions. And explain why if we're serious about being fair - that fairness has to encompass fairness for all. And for the last part of the talk, I'm still very much in

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the thought process. I'm trying to sketch out what it means to have a colloquial due process that encompasses the concerns of #MeToo complainants and claimants as well as #MeToo perpetrators. It's a lot to do. We'll see how much we get through and I'm excited to hear your questions.

We'll start with the question of what is due process. Formally speaking, legally speaking, the Constitution under the Fifth Amendment guarantees that no person shall be deprived of life, liberty, or property without due process of law. And that's generally understood to apply to the government acting against citizens and not to private actors unless those private actors are acting under color of law and that's known as procedural due process. The Fourteenth Amendment extends the Fifth Amendment to the states and is thought by many, but not all, to guarantee substantive due process as well and, in certain narrow instances, it is attached to punishments such as excessive fines.

So what does formal due process mean in the #MeToo setting? In the criminal setting, it means that one gets notice of the charges, a right to a full investigation, a right to cross-examine witnesses, a right to a neutral and impartial decision-maker as well as ancillary protections...such a presumption of innocence and a high standard of proof which is beyond a reasonable doubt. It is the strongest set of protections that we afford because the potential deprivation - loss of liberty - is incredibly significant. We also have due process protections in administrative settings, but they are much lessened because the interests of the person facing deprivation are also lessened.

This has also been a very big discussion in the Title IX setting. Under Title IX, punishments do not include deprivation of liberty, but individuals have significant interests in their ability to continue their education. Sanctions for students found to have violated Title IX can include: no contact orders, barred access to dorms, exclusion from university housing, exclusion from classes, exclusion from campus, suspension or expulsion. For faculty members, it can span the range from loss of employment, loss of tenure, temporary suspension from work activities, a requirement of an open-door policy, and notice to the students. And under the Obama Administration, there was something called a "Dear Colleague Letter" that strongly encouraged and one might even say, directed universities to change their approach to many of the processes involved in Title IX hearings, and it resulted in some universities not providing notice of charges but only notice of an investigation. In some universities, accusers may remain anonymous. In some universities, accused may not have legal representation, may not cross-examine witnesses, and this set of changes - this "Dear Colleague Letter" and the resulting university behavior - have been very controversial, have been widely criticized, and have brought together some unusual bed

fellows. So people from as far ends of the spectrum as Betsy DeVos and the American Association of University Professors have both voiced concern, as well as Justice Ginsburg, that these Title IX changes might not be affording sufficient due process.

The last setting is punishment. Proportionate punishment is actually governed by the Eighth Amendment. It's not governed generally by the Fifth or the Fourteenth Amendment, but I've included it here for two reasons. One is because there are some instances in which fines can fall under the Fifth or the Fourteenth Amendment, and I think much of the public, when they are talking about concerns with due process and the punishment that alleged perpetrators are receiving, are really alluding to this Eighth Amendment notion as well. For example, when Gayle King, who is a television commentator, spoke, she said, "I think when a woman makes an accusation; the man instantly gets the death penalty. There has to be some sort of due process here." I think what she is alluding to is some amalgamation of notions that underpin both the Fifth and Fourteenth Amendment, as well as the Eighth Amendment. But, given that we have people on the television, people in the news, people in Congress talking about these due process protections, it's worth remembering all the settings in which these due process protections do not attach.

First, private punishment. Imagine, parents are informed by a 15-year-old girl that their 17-year-old son attempted a sexual assault against her. Parents are not required to provide any process before grounding him, taking away his car keys, telling him to apologize - any sanction that they want to take that doesn't run afoul of any other law...they don't need to provide their son due process.

Hiring: Casting directors declined to hire actresses Rose McGowan and Anabella Sciorra because they have heard a rumor through the grapevine that these women are difficult to work with - those decisions were not governed by due process. Now, it may be, in fact, that some of those decisions were acts of retaliation, but these actresses cannot bring a due process claim under the Constitution.

Private employers: If you are in an at-will state, and you are a private employer with private employees, there are no due process protections that attach. You may have contractual protections, and - and often many people - and hopefully lots of people do. But you do not have formal due process protections.

Refusal to consort: Friends who refuse to socialize with a member of their social group accused of having engaged in an alleged sexual assault do not owe that friend due process.

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Refusal to purchase: A sports enthusiast who refuses to buy Nike apparel after its support of Colin Kaepernick. A movie buff who refuses to pay money to see movies with Mel Gibson. There is no due process that attaches to any of these situations.

Now that we have sketched out the legal constraints of due process and where and when they apply, how should we be thinking about all these settings in which #MeToo claimants are coming forward, but formal legal due process does not attach? That leads us to ask why is it people want or think that due process should attach. And, I think, at the core of due process is a concern about fairness, a concern that when someone is accused of doing wrong, that he or she have an opportunity that is fair to speak out, to defend his or her name. And, under criminal settings, we provide robust protections. We give you the right to an investigation, to cross-examine; to impartial decision makers. But what if there is no government involvement and no deprivation of liberty, but simply a social or reputational sanction? What are you owed and by whom, if anyone?

Let me give you a concrete example. Justice Brett Kavanaugh, in his confirmation hearing said, “we live in a country devoted to due process and the rule of law. That means taking allegations seriously. But, if the mere allegation, a refuted allegation from 36 years ago, is enough to destroy a person’s life and career, we will have abandoned the basic principles of fairness and due process that define our legal system and our country. I ask you to judge me by the standard that you would want applied to your father, your husband, your brother, or your son.” And because Justice Kavanaugh is a lawyer, this was a very carefully crafted statement. Notice that he did not say, “I have the due process protections, and I’m being denied those ones granted to me under the Constitution.” What he really said was, “we’re a country that cares about fairness. Judge me in a way that you think is fair.”

The problem for us is that call to action begs the question - it doesn’t resolve it. Too many people reflexively say well, then the answer is to take the rules we have in the criminal system and apply them in all other settings. I don’t think that’s a particularly helpful match, and I want to identify some instances in which it really seems, to me at least, a serious mismatch. So take one example: the personal narrative. Someone who has experienced a sexual assault or sexual harassment has a Facebook post, a tweet, a blog post, a personal conversation in which she or he tells her or his story. Too often, I think, people assume that that must surely be a first step of a legal proceeding. If you’ve come forward to tell your story, really, we should just see this as time zero, and what we’re heading towards is a Title VII suit or a

Title IX claim or criminal accusations. But, for many #MeToo claimants, it's not.

For many #MeToo claimants, what they want is to tell their story. So, for instance, Chloe Dykstra wrote a Medium post discussing an anonymous ex-boyfriend and his alleged emotional abuse of her. She was not making a legal claim. She was not saying he should be prosecuted. She was not saying he should lose his job. She was saying, "I need to speak my truth. I need to acknowledge that what happened to me was traumatic, and I want to provide solidarity to other people who want to come forward and know that they're not alone." What was she seeking? Empathy. To educate. To provide support. It's an odd occasion for in which to demand that due process should or would attach. Her post does not demand judgment of innocence or guilt by other parties - though others may certainly choose to make such judgment themselves.

Take the aggregated personal narrative. Some of you may know there's a list called the Shitty Media Men List, and it is designed as a warning device. If you are in the media world, and you're going to take a meeting with someone, know before you go into the room that other people have had unpleasant encounters with this person. There is a similar list going around in academia to identify institutions and what responses they've taken to instances of alleged harassment. The people participating in these lists, aggregating these lists, do not owe an alleged unnamed perpetrator due process. They're not decision makers. They're not depriving those listed of any particular interests. They're not obliged to provide process. That doesn't mean there should be no check on these activities. But those checks are not due process checks.

So what check might exist? Defamation law. Libel law. Social pushback. But due process simply isn't the right tool. Think of another setting: journalism. What is it fair for journalists to report? What does it mean when people complain that journalists aren't affording alleged #MeToo perpetrators due process? Again, I think it's a mismatch. Journalism is not designed to provide justice. Journalism is designed to provide access to information. Now, that doesn't mean that there should be no standards governing what journalists can and should report. But due process is not the best fit to determine or help us understand when journalists are behaving fairly in reporting allegations. There are already mechanisms in place.

So, for example, the Society of Professional Journalists' Code of Ethics - which is widely followed - has lots of provisions that I think accord with Americans' basic notions of fairness. The standards govern fact finding and fact reporting. They direct reporters to not misrepresent, not to oversimpli-

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fy; they prohibit deliberate distortion of facts. They require the gathering, updating, and correcting of information, and crafting limitations on when anonymity can be promised along with a required explanation of why anonymity is granted when it is granted; seeking subjects of a story to allow them to respond to accusations of misdoing and to label advocacy and commentary.

Probably the one that I think we've gotten the most confusion about and made the least progress on is the so called the "Court of Public Opinion." So, when you as a private citizen read a story, hear a story, are trying to decide what to think about a claimant and a claimer - how should we be thinking about what it means to make a fair decision in those settings? So, who are you friends with? Who do you hire? When do you intervene? Who do you believe?

And, in saying that I want to emphasize that it's always important to recognize...just because we are calling it a "Court of Public Opinion," it may not be that what you are really being asked to do is to make a judgment of truth and falsity. Sometimes what you are being asked to do is to offer empathy, offer sympathy, offer support, offer an ear to listen, and to tell those people what you are required to do is offer due process doesn't make a lot of sense. That said, I do think there are lots of intuitions that Americans brought to the crafting of formal legal due process that are intuitions and norms and values that we share that we should be bringing to these more social parts of the #MeToo conversation.

I never thought I'd be giving an academic talk in which I quoted a Real World cast member, but here we are. Jacinda Barrett, in discussing Chloe Dykstra and Chris Hardwick, had the following and - I think - quite astute thing to say: "The accuser's story bears no resemblance to the one I shared but what is of supreme importance is that every woman and every man deserves a voice. Accuser and accused: everyone deserves to be heard. A rush to judgment denies the right to due process and the #MeToo movement deserves due process." So what might that look like?

So I have few initial thoughts and I am interested to hear what you think. The first is to enter these dialogues with an open mind - to be willing to believe alleged victims. Now, that lacks the simplicity of the term that's been going around: "Believe All Women." But I think it adds some important nuance. "Believe All Women" - in my mind - is a short hand for a more complex idea. The reason we need to believe all women is similar to the reason we need to express that black lives matter. "Black Lives Matter" really means black lives matter too. It's not an implicit devaluation of others, it's a demand of equality. And "Believe All Women" - while a little lack-

ing in its nuance - I think is a similar demand for equality. It is not a demand to believe all women - whatever they say, regardless of what is said after that - that's the beginning and end of the story, but rather, a willingness to believe women at all. To approach the inquiry with an openness to their truthfulness. Because the lesson of Title VII, of Title IX, of our ongoing epidemic of sexual assault against women and men, is that often victims aren't believed.

And so, we need to reset our expectations for what counts as a credible, believable story, and part of the beauty of #MeToo is creating awareness and understanding that sexual harassment and sexual assault are not exceptional. It happens all the time, to all kinds of women and men in all kinds of setting...And to be open to those stories, just as in criminal settings, defendants get a presumption of innocence. Given what we know about the tolls and costs of coming forward and our background prior assumptions about the kinds of people that came forward, we need to change. #MeToo creator Tarana Burke has said, "when we say we believe survivors, it's not believe them without investigation. Believe them without interrogation. We have set a precedent in this country of not believing...thinking that women in particular are lying when they come forward with these allegations."

The mantra "believe survivors" is about - can we start with the premise that people do not often lie about the pain and trauma of sexual violence. If we start with that premise - that we believe that it can be true - then you can have that investigation. You can have an interrogation. So, that's point number one.

Point number two is a rejection of numeracy. One of the problems law and society often face in trying to change systemic, pervasive bad behavior...is that you try and start with the low hanging fruit, and there's some virtue to that. Everyone can look at Harvey Weinstein and say that man is a moral monster. Nobody in this country with a conscience thinks that anyone should be allowed to do that to any individual, and people across the political spectrum, from across all belief systems agree. That's an easy claim. We can surely all agree about that. But the danger - the harm - in starting with Harvey Weinstein, is that that's an easy case. It's a case where there are dozens - if not hundreds - of women coming forward with evidence. Bill Cosby - right? Remember the cover of New York magazine, with all of the women sitting in the chairs, all of whom accuse him of wrongdoing?

My second point is the rejection of numeracy. Be willing to believe one woman. Be willing to believe one man. There doesn't have to be eyewitness testimony, though that is strong support. There doesn't have to be physical evidence, though there can be. The same reason that one woman is reluctant

to come forward is a reason why other women or other men might be reluctant to come forward, and it's also the case that while many perpetrators are serial offenders, not all of them are. Sometimes people commit a single bad act or commit a series of bad acts against a single person. We know this from child abuse, right? We have the same problem of - we now - people can recognize now serial pedophiles in the Catholic Church. But that recognition tends some to discount the single instance within a family. Well, if this has happened, surely it would have happened to others, they say.

A third point: what would colloquial due process for claimants mean? Respect claimants' autonomy regarding their own claims. Don't disclose someone else's claim for them unless you are required to do so by law. I have, as many people do, almost an infinite number of criticisms of the Kavanaugh confirmation process, and they are not all geared at one side. So, for example, whoever chose to disclose Dr. Ford's accusation against her wish to remain private violated Dr. Ford and that's a serious concern. So, for those of you who are not mandatory reporters, I strongly encourage you to have access and awareness of anonymous counseling services - so that people who come forward, you can provide them with options of how and if they want to pursue their claim.

A fourth point: try your best to be a neutral decision-maker. This applies across settings whether you are on a jury in a criminal proceeding or you are simply a reader of a newspaper story about an alleged #MeToo claim. We need not approach these claims with an assumption that one side is always right, but we do what we do in regular non-#MeToo settings, which is - we look at different kinds of evidence, we do research to understand why certain kinds of evidence might be present or lacking. We apply higher standards when we have sort of higher consequence to the judgment.

Related point, number five is to understand and learn and educate others about the science related to sexual assault and sexual harassment. There is a wealth of academic and scientific information about why not just women, but men, are reluctant to come forward. The stigma that women often face can be doubled for men. It is doubled for people from minority communities who have an extra burden of not being believed. It is important to learn about that and learn about memory. I received many emails from alums after I spoke out about the confirmation hearing saying, "well, aren't you troubled by these discrepancies or how memory degrades over time?" And I had someone write me a very moving story about how in Vietnam on Christmas Eve, he had come on unexpectedly another batch of soldiers, they had a break in fighting, and they sang O Holy Night, and that it's been a memory that he's held near and dear for over thirty years. He remembers who was there, he remembers the song, and then he reveals, "Lo and be-

hold, my brother found these letters I had sent to him, and the letters revealed that wasn't the song we sang. The people I thought were there - it was different people, and yet, I would have been sure this was my memory - that this was true." And I think that's a legitimate concern. We need to understand how memory works and I tried to explain some of the relevant literature. I said, "well, the memory for good experiences and the memory of trauma, science tells us can be different." I would have been happy to see scientists come and testify at the Kavanaugh hearings about how memory degrades over time. But I would have liked to also see someone speak about how binge drinking or black out drinking can affect one's memory. Right? It's a willingness to accept information and science that informs both sides of the case rather than simply limitations or criticisms of #MeToo claimants.

The last point - number six - which is, as much focus has been put on this idea that losing one's job is a punishment, that losing one's reputation is a punishment, that losing one's job attached to a #MeToo claim will form a death penalty under which a person will not be able to be employed...I want to emphasize I think those are serious concerns. I think that people who are accused of #MeToo wrongdoing have serious interests at stake. But I think sometimes, when we frame it as punishment - as a worry about excessive punishment or about due process - we're leaving off one side of the equation. We're leaving off what has been the colloquial punishment for the woman who experienced trauma...for the man who speaks out and is then retaliated against.

Now, there are legal protections. Title VII provides protections against retaliation in the workplace, but it doesn't provide protection for other forms of retaliation. So, for example, the actresses that are not covered by Title VII when Harvey Weinstein says, "she's crazy. She's a bitch. Don't hire her." They don't have any legal protection, and it's not only about legal protection. When someone does something to sort of harm a victim...to think of that as a punishment as well and as something that society should take seriously at redressing. So much of the #MeToo conversation has been focused on what should happen to the people who are accused. And I think that's an important conversation. But much less has happened, what should we be doing as society for victims? How can we protect them? How can we reintegrate them into workplaces? And so, I think I will end with a quote. Again, an unlikely source...Alyssa Milano has been one of the early actors and very active in the #MeToo conversation and in talking about sort of the post-confirmation landscape said the following: "I think that right now we are defining what due process looks like in non-legal settings. Because we never really defined it before, because women haven't come forward. So,

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we really do need to have due process. What does it mean to have a fair investigation in these processes so that we can move forward, so that we can change the cultural and societal, systemic institutionalization of sexual abuse and sexual assault?”

